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Last Exit Bosnia – Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts

by MICHAEL BOHLANDER^{*}

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was set up by the United Nations in 1993 as an *ad hoc* tribunal to try cases based on the violence then prevalent in some of the successor states of the former Socialist Federal Republic of Yugoslavia. This choice of words meant, on the one hand, that it had not been in existence before (some of) the crimes it was meant to try were being committed and, on the other hand, that it was not meant to be a permanent institution. The idea behind it was also that it should try mainly the top-level perpetrators, the masterminds and political as well as military leaders of all sides to the conflict. Due to the fact that in the beginning of its operation the war was still raging in Bosnia, and that therefore it was difficult to secure the presence of such high-ranking leaders, it started its first case with a low-level accused, Dusko Tadic, whose moniker almost became a household name, as the man who was the object of the first genuine international war crimes trial after Nuremberg and Tokyo.

The people arrested and transferred to the ICTY in the course of the first few years were mostly of the same category, including a few one might term “middle-management”, like Blaskic, Kordic and Cerkez. Apart from Slobodan Milosevic, who was unceremoniously handed over to the ICTY by the former Serbian prime minister Zoran Djindjic in an act of Gordian-knot-cutting, and the admittedly noble example of Biljana Plavsic’s public remorse, none of the former “big guns”, heads of state like Franjo Tudjman and Alija Izetbegovic, or the chief of the self-proclaimed Bosnian Serb Republic, Republika Srpska, Radovan Karadzic, and his executioner Ratko Mladic, have been arrested, let alone transferred to the Hague. Izetbegovic has, to public knowledge and maybe not surprisingly, not been indicted to-date, and Tudjman died before the ICTY Prosecutor could make up her mind about whether or not to indict him.

The backlog of cases at the ICTY, as well as the length of time it takes to finish an individual case, has spurred its judges to consider ways and means of finding an “exit strategy” that would help the ICTY do justice to the second meaning of the words “ad hoc” described above, and to wind down its operation within a reasonable time-frame. The budget for the ICTY (and its sister tribunal for Rwanda, the International Criminal Tribunal for Rwanda or ICTR) gobbles up a large slice of the United Nations financial pie, and other peace-keeping missions will clamour for their fair share of the same. The ICTY was therefore under pressure to keep control of this process and to contribute as much as possible to shaping the procedure of phasing its cases out. One way to do this was to consider the possibility of returning cases to the national judicial systems of the former Yugoslavia, and

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here especially to Bosnia. The Rome Agreement of 18 February 1996, also called the “Rules of the Road, an agreement between Presidents Izetbegovic, Tudjman and Milosevic¹ already provided for a procedure of screening domestic investigations by the ICTY Prosecutor, without whose consent a local prosecution could not go forward. But what was necessary now was a procedure that also worked the other way.

This article presents an overview over the development of the exit strategy, and breaks new ground insofar as for the first time the Office of the High Representative’s (OHR) Consultants’ Report of 27 May 2002, which had been confidential and was kindly provided to me by the OHR, is described in detail. The paper, on account of the myriad of legal issues involved, cannot be a critique of the legal background of the exit strategy, but merely gives an account of its factual development until April 2003.

I. DEVELOPMENTS UNTIL MAY 2002

In the year 2000, under the then presidency of Claude Jorda, now the French judge at the International Criminal Court (ICC) and an especially energetic president of the ICTY as far as the critique and improvement of its performance were concerned, the judges began thinking ahead towards formulating a completion or exit strategy, after getting a little nudge from the Expert Group which scrutinised the functioning of both the ICTY and ICTR in 1999.² Elected President of the ICTY on 16 November 1999, already on 27 January 2000 Claude Jorda made a first statement in which he promised to explore avenues of speeding up the proceedings of the ICTY, explicitly referring to the report of the Expert Group.³ This was followed by an extraordinary plenary session on 18 April 2000, where the Prosecutor described for the first time her completion strategy in concrete numbers, and stated that she would finish thirty-six investigations, mainly related to Kosovo, by 2004. The judges mandated the President to present a long-term judicial strategy for the tribunal.⁴ On 23 May 2000, the President addressed the Plenary Meeting of the Peace Implementation Council, a

¹ Para. 5 of the Rome Agreement of 18 February 1996 provides:

5. Cooperation on War Crimes and Respect for Human Rights:

As part of their obligation to cooperate fully in the investigation and prosecution of war crimes and other violations of international humanitarian law, as provided in Article IX of the General Framework Agreement, the Parties will provide unrestricted access to places, including mass grave sites, relevant to such crimes and to persons with relevant information. IFOR will work to provide a secure environment for the completion of these tasks.

Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action.

See the OHR website at <http://www.ohr.int/ohr-dept/hr-rol/thedept/war-crime-tr/default.asp?content_id=6093> (last accessed on 19 May 2003).

² See the recommendations in the “Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda”, 22 November 1999, UN Doc. A/54/634, p. 101.

³ Press release of 27 January 2000, CC/P.I.S./466. This press release and all the following can be found on the ICTY website <www.un.org/icty> under “Latest developments”, in the folder “Archived Press Releases”.

⁴ Press release of 18 April 2000, CC-JL/P.I.S./491-e.

body established under Annex 10 to the Dayton Agreement, and for the first time expressly mentioned that cases be tried by the states themselves.⁵

In his speech to the Security Council on 20 June 2000, the President addressed almost exclusively the creation of a pool of so-called *ad litem* judges, who were to be assigned to cases on an *ad hoc* basis, but only for trials and not pre-trial proceedings. President Jorda did not address at that time the ideas of referring cases back to domestic jurisdictions, maybe because it might have proved counter-productive with respect to the *ad litem* issue.⁶ In his *Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia* of May 2000,⁷ which formed the basis of his speech before the Security Council in June, the President acknowledged⁸ the need to provide the administration of the United Nations with “a relatively exact idea of the length of the mandate”⁹ of the ICTY.

A study by the Human Rights Centre and the International Human Rights Law Clinic of the University of California at Berkeley and the Centre for Human Rights of the University of Sarajevo¹⁰ of May 2000 had come to the conclusion that a larger involvement of the local justice systems in Bosnia was advisable, and that international lawyers often lacked the necessary familiarity with the legal system of Bosnia.

The Prosecutor, Carla del Ponte, indicated as early as 6 October 2000 that she might even be willing to consider co-operating in the prosecution of lower-level war criminals, on the occasion of a new initiative launched by the Republika Srpska to prosecute those involved in the Srebrenica massacre.¹¹ In his speech before the United Nations General Assembly on 20 November 2000, Claude Jorda again addressed the limited mandate and indicated that the ICTY was contemplating the idea of trials held by national justice systems.¹² In her speech to the Security Council on 21 November 2000, the Prosecutor did, however, indicate that she not relish the intention expressed by Yugoslav President Kostunica of trying Slobodan Milosevic in Belgrade instead of transferring him to the ICTY.¹³ She repeated these sentiments in a press statement on 20 December 2000 in the Hague.¹⁴

A first case in which the Prosecutor did not seek a referral under Rule 9 of the ICTY Rules of Procedure and Evidence, and openly applauded the activities of the domestic judiciary, was the Croatian investigation of former general Mirko Norac for his involvement in the so-called Gopscic case and other war crimes. Norac, who could be termed at least a mid-level offender,¹⁵ was sentenced to twelve years’ imprisonment for war crimes by the Rijeka County Court on 24 March 2003, a sentence commensurate with those handed down by the ICTY in similar cases.¹⁶

⁵ Press release of 24 May 2000, CC/P.I.S./502-e.

⁶ Press release of 20 June 2000, SB/P.I.S./512-e, containing the full text of the speech.

⁷ Available on the ICTY website as an appendix to the press release of 20 June 2000, SB/P.I.S./512-e.

⁸ At paras. 1 to 6 of the Report.

⁹ *Ibid.*, para. 3.

¹⁰ “Justice, Accountability and Social Reconstruction, An Interview Study of Bosnian Judges and Prosecutors”, May 2000, directed by Harvey Weinstein, Laurel Fletcher and Ermin Sarajlija.

¹¹ Press release of 6 October 2000, PR/P.I.S./532-e.

¹² Press release of 20 November 2000, JD/P.I.S./540-e, containing the full text of the speech.

¹³ Press release of 24 November 2000, JL/P.I.S./542-e, containing the full text of the speech.

¹⁴ Press release of 20 December 2000, FH/P.I.S./550-e.

¹⁵ Press release of 21 February 2001, FH/P.I.S./565-3.

¹⁶ See “News in Brief” on the website of the Organisation for Security and Cooperation in Europe (OSCE) Mission in Croatia <www.osce.org/croatia> (last accessed on 3 April 2003).

On 12 May 2001, Claude Jorda visited Sarajevo on the occasion of the debate about a Truth and Reconciliation Commission of Bosnia, and there he expressed doubts and reservations regarding the quasi-judicial powers of that commission with respect to the primacy of the ICTY. He said, *inter alia*, that the mandate of the truth and reconciliation commission must not be *similar* to that of the International Tribunal. He stressed that although he supported the initiative, he was also concerned that the most recent draft law seemed to grant to the commission functions and powers similar in many ways to those of the International Tribunal. For this reason, he did not believe that the commission was merely a complementary organ. The draft law also failed to define clearly the commission's obligations to the International Tribunal. He pointed out that the language of the draft implied that the truth and reconciliation commission will have *judicial* powers which belong exclusively to the International Tribunal, and that the commission appeared to be vested with real investigative powers. While investigating did not fall within the exclusive domain of the Prosecution, the Prosecutor nevertheless had primacy with respect to national jurisdiction in this area. Even though the commission was not bound by this principle, the draft law would have to take it in consideration. It also appeared to him that the Commission might have the authority to demand that it be provided with all information it considered useful for its mission, which infringed on the activity of the Prosecutor. All this confused the role of the proposed commission and could risk infringing upon the International Tribunal's independence and prove extremely prejudicial to it in the long term. To define the obligations of both the commission and the International Tribunal, he suggested that a provision expressly state that the commission would not interfere in any way in the judicial activity of the International Tribunal and that it would provide to the Tribunal all the public or confidential information and documents it required, maintain close contacts with its investigators and authorise a liaison officer from the International Tribunal to attend its hearings. The ICTY's mission of reconciliation would be seriously compromised if the highest political and military accused were not arrested and tried by the International Tribunal before the completion of its work. Therefore, it was imperative that the commission and the Tribunal accomplish their respective mission jointly, which rendered necessary the prompt arrest and transfer of all accused to the Tribunal.¹⁷

In his next address to the Security Council on 27 November 2001, Claude Jorda finally dealt with the idea of "relocating", as he called it, cases to the states in the Balkans. He indicated that the judges of the two International Tribunals had met in September 2001 in Dublin, together with Hans Correll, Under-Secretary-General for Legal Affairs, and had undertaken to reflect upon the ICTY's priorities for the years to come. They discussed whether the ICTY should not focus more on prosecuting the crimes committed by the high-ranking military and political officials. The cases of lesser importance for the Tribunal could, under certain conditions, be "relocated", that is, tried by the courts of the States created out of the former Yugoslavia. This solution would have the merit of considerably lightening the Tribunal's workload, thereby allowing it to complete its mission at an even earlier juncture. Moreover, it would make the trial of the cases referred to national courts more transparent to the local population and so make a more effective contribution to reconciling the peoples of the Balkans.

¹⁷ Press release of 17 May 2001, JL/P.I.S./591-e, containing the full text of the speech.

For it to be possible to “relocate” the cases of lesser importance for the Tribunal, the judicial systems of the States of the former Yugoslavia had to be reconstructed on democratic foundations. The national courts would have to be placed in a position to accomplish their work with total independence and impartiality and with due regard for the principles governing international humanitarian law and the protection of human rights. This would suppose, among other things, that under the aegis of the representatives of the international community in the Balkans, judges or international observers were sent to participate in or be present at the trials of war criminals and that existing training programmes for local judges be expanded. President Jorda told the Security Council that he was aware that the process of judicial reconstruction was making good progress. The International Tribunal was prepared to make its contribution and be willing to reflect on what amendments to the rules of procedure and evidence would be implied by a redefinition of the relationship between the International Tribunal and national courts, or indeed any means in the processes of national reconciliation.¹⁸ He had already voiced these ideas before the General Assembly on 26 November 2001.¹⁹ The topic was also addressed by Carla del Ponte, the ICTY Prosecutor, in her speech to the Security Council on 27 November 2001.²⁰

In January 2002, the President, Prosecutor and Registrar created a working group whose mission was to examine the problems which might arise through the implementation of the process of referring certain cases. In February 2002, they addressed a joint letter to the United Nations Secretary-General informing him of this initiative.

On 28 February 2002, Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues in the United States Department of State, and himself a former staff member of the Office of the Prosecutor at the ICTR, had already upped the ante in a speech before the Committee on International Relations of the United States House of Representatives. He was pushing the new Bush Administration’s intention to wind down the two tribunals as quickly as possible, by saying, not always very diplomatically:

The United States remains proud of its leadership in supporting the two ad hoc Tribunals and will continue to do so in the future. Their work is important and has greatly contributed to justice for the victims of war crimes and to ending impunity for those who would orchestrate and commit genocide. ... These efforts show that the Tribunals are on the path to success. However, despite these achievements, we recognize that there have been problems that challenge the integrity of the process. In both Tribunals, ... the process, at times, has been costly, has lacked efficiency, has been too slow, and has been too removed from the everyday experience of the people and the victims. ... [T]he goal of this Administration is to see the Tribunals reach a successful conclusion. That means the Tribunals need to remain within the spirit of the

¹⁸ Press release of 27 November 2001, JD/P.I.S./641-e, containing the full text of the speech.

¹⁹ *Ibid.*

²⁰ *Ibid.*

founding resolutions and pursue those who bear the greatest responsibility. ... [T]he Tribunals were not established to judge each and every violation of law that occurred during the conflicts. And they were not designed to completely usurp the authority and, more importantly, the responsibility of sovereign states. In establishing these organs, the Security Council clearly envisioned the shared responsibility of local governments to adjudicate some of these serious violations. And it is this shared responsibility that will lead us to the successful conclusion we seek. As a result, this Administration is ... urging both Tribunals to begin to aggressively focus on the end-game and conclude their work by 2007-2008, a timeframe that we have stressed and to which officials from both Tribunals have referred. We are calling on the regional states to do their part: to cooperate fully with the Tribunals' investigations and prosecutions. We are aggressively engaging the Federal Republic of Yugoslavia, Bosnia-Herzegovina, and Croatia at the highest levels to remind them of their international obligation to transfer all at-large indictees to The Hague. ... We are also pressing the governments in the former Yugoslavia to accept their responsibility, ... to hold accountable the mid and lower level perpetrators. The lower level perpetrators in both of these regions do not get a free pass. We do not want to see an abandonment of the state responsibility and are encouraging appropriate domestic judicial and administrative action. ... For this ... cause to be successful, ... the international community, the Tribunals, and the regional states must coordinate, accept their role and individual responsibility, and go down this arduous road together. ... In ... creating an environment where there is not a dependency on international mechanisms we will bring justice to the victims and restore confidence in domestic institutions in societies throughout the world.²¹

President Jorda took this criticism in stride when Prosper and the U.S. Ambassadors in the Hague, Belgrade, Zagreb and Sarajevo visited the ICTY on 6 March 2002, by expressing his pleasure at the United States' support for the reforms undertaken by the ICTY.²²

In March and April 2002, the President, Prosecutor and Registrar met with the members of the OHR responsible for reforming the judicial system, and together they formulated a plan of action. At an extraordinary plenary session on 23 April 2002 they

²¹ Available at <www.house.gov/international_relations/107/pros0228.htm> (last accessed on 6 April 2003).

²² Press release of 6 March 2002, JdH/P.I.S./662-e.

reported to the Judges of the ICTY, assembled to discuss the completion strategy for the mandate of the Tribunal.²³ The President recalled that the report was consistent with the programme that the Prosecutor and he had presented to the United Nations Security Council in November 2001. In keeping with the goal of focussing on the persons responsible for the most serious violations of international humanitarian law, the report examined the possibility of referring cases involving intermediate-level alleged perpetrators to the domestic courts. The Tribunal intended to satisfy itself beforehand that the domestic courts were operating with full respect for the principles of humanitarian law and the protection of human rights. Amongst the solutions the report recommended were the establishment of a chamber at the envisaged State Court of Bosnia and Herzegovina with specific jurisdiction to try war crimes suspects. Additionally, the report also proposed the appointment of international judges or observers to the State Court, and provision of training in international humanitarian law to the local judiciary and court personnel.²⁴

II. THE OHR REPORT OF MAY 2002

The consultants, Peter Bach, Kjell Björnberg, John Ralston and former ICTY judge Almiro Rodrigues, had been retained in order to examine the issues and make recommendations for future war crimes prosecutions to take place in Bosnia and Herzegovina. The OHR provided the consultants with a large number of reports.²⁵ In addition, the consultants reviewed relevant existing legislation and draft legislation.²⁶ They held meetings with representatives of organisations, institutions or organs of government at the State level, in the Federation, Republika Srpska and in the Brcko District. Similarly they met with representatives of various international organisations, including UNMIBH, involved in Bosnia and Herzegovina, as well as with representatives of the ICTY.

The ICTY was seeking to identify a trustworthy domestic court that it is willing to transfer cases to. A figure of up to seventeen cases involving fifty accused had been mentioned in this context. Under the Rules of the Road programme there were already potentially up to 300 cases which could be prosecuted locally. The International Crisis Group (ICG) identified an additional sixty-three alleged war criminals not indicted by the ICTY nor necessarily mentioned in Rules of the Road files. At least half did not even appear to be under investigation, and all enjoyed some degree of control in their home municipalities. These cases were likely to be highly sensitive, and it was questionable whether they could be conducted at the local level. Local police investigations and prosecutions were criticised as ethnically biased, subject to improper influence by officials and criminals alike, and not professionally investigated, prosecuted or adjudicated.

As reported by the International Crisis Group, war crimes in one entity or canton were still hailed as acts of heroism in another. Further, it was stated that the ICTY's ability to try

²³ See para. 6 of the "Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, June 2002", available on the ICTY website as an appendix to the press release of 20 June 2000, SB/P.I.S./512-e.

²⁴ Press release of 24 April 2002, JdH/P.I.S./671-3.

²⁵ "Consultants' Report to the OHR, The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina", May 2002, Annex 5. An electronic copy with full annexes is on file with the author. Citations are to the pages of the report.

²⁶ *Ibid.*, Annex 6.

only major war crimes cases means that hundreds if not thousands of war crimes suspects would have to be tried in Bosnian courts if they were to be tried at all. Those courts must be made fit to handle this delicate assignment. The current practice of trying indicted war criminals in cantonal or entity courts had proved inadequate. Justice had neither been done nor been seen to be done. Trials were regarded as occasions for dispensing “ethnic” justice or exacting revenge. Moreover, such trials were politically explosive, especially as various past and present national leaders were among those indicted or likely to be indicted.²⁷

The report recalled that the ICTY had developed a project proposal regarding the remission of some cases to a special court in Bosnia and Herzegovina. Before presentation of the proposal to the United Nations Security Council on 26 November 2001, the ICTY Prosecutor had presented it to the OHR, the United Nations Mission in Bosnia and Herzegovina (UNMIBH) and the Bosnia and Herzegovina Council of Ministers (COM). The proposal was welcomed by the three bodies as an opportunity to expedite war crimes prosecutions, enhance the work of the ICTY and contribute to judicial reform in Bosnia and Herzegovina. All three agencies had agreed that the Court of Bosnia and Herzegovina appeared to be the most appropriate institution for the prosecution of war crimes cases.

The consultants examined various models for the conduct of war crimes cases, including the Federation Cantonal Courts, District Courts in the Republika Srpska, the entity Supreme Courts and the Brcko District Court. They also considered establishing a special court (“mini-Hague”), a special court in each entity or a special state level court. As the draft law on the Court of Bosnia and Herzegovina established a criminal division, the consultants also examined whether the establishment of an international humanitarian law chamber or division in this Court would be the best option.

The main issues were:

- political and other influence of the proceedings;
- serious concerns about the independence of the judiciary;
- widespread concerns over impartiality and ethnic bias;
- doubts that mono-ethnic courts can deliver impartial judgements;
- objections to cantonal or district courts having a role as that would be open to influence at local level;
- cases against some of the more notorious offenders would never happen if left to local authorities;
- little confidence that investigations would be conducted efficiently, effectively or impartially;
- questions of competence and failure to meet international legal standards;
- lack of suitable infrastructure and financial support to conduct trials of this nature;
- need for a mixed judiciary representing the three main ethnic groups in Bosnia and Herzegovina;
- protection of witnesses;
- security of personnel, premises and information security;
- lack of inter-entity and intra-entity co-operation in war crimes cases;

²⁷ *Ibid.*, pp. 5-7.

- unlikelihood of arrests of persons accused of war crimes, especially when residing in the other entity;
- verdicts from courts in one entity not likely to be recognised in the other entity, verdicts of the Court of Bosnia and Herzegovina not likely to be recognised in either entity;
- the need to harmonise local law and practice with ICTY rules and jurisprudence, particularly with regard to command responsibility; and
- securing adequate funding.

The majority of the persons interviewed from the Federation and the international community observed that cases would not be conducted with sufficient quality without international participation, which was even accepted by some from the Republika Srpska. Most agreed that it would be positive to have cases prosecuted in Bosnia and Herzegovina. This would raise confidence in local institutions and raise awareness of the overall issues involved. In meetings with the representatives of the Federation, there was considerable support for a special court to deal with war crimes cases. There was some digression as to whether it should be at the state or entity level, but most favoured a state-level court and felt that an international humanitarian law division within the Criminal Division of the Court of Bosnia and Herzegovina would be a suitable solution. In the Republika Srpska there was support for special courts to deal with cases at the entity level. The representatives were against a state-level court and questioned whether a state court could have constitutional competence to prosecute war crimes cases. There was also a strong desire for the venue of cases to be determined by the locality in which the crime took place, and not where the victims resided. Existing structures should be used, with monitors. A separate court beyond the current system would mean loss of confidence in domestic courts. The international community clearly favoured a state-level solution²⁸.

The consultants recommended the establishment of an international humanitarian law (IHL) division within the Court of Bosnia and Herzegovina. This division, composed of both an appeals chamber and one or more trial chamber was to bear overall responsibility for the conduct of cases involving serious violations of IHL in Bosnia and Herzegovina. It would have national and international judges. One of the international judges should be elected president of the IHL division.²⁹ The consultants proposed that the IHL division be freestanding from the Criminal Division and any possible Special Organised Crime, Economic Crime and Corruption Division, although administratively it would be a part of the Court of Bosnia and Herzegovina and have the advantage of shared personnel, equipment, etc. They also said that an IHL state prosecutor's office should be established.

Referring to the jurisprudence of the Bosnian Constitutional Court, the consultants were of the opinion that the establishment of such a division was not in contravention with the Constitution of Bosnia and Herzegovina. The legislation on the Court of Bosnia and Herzegovina would have to be amended and provisions for the proceedings in these cases included in the State Criminal Procedure Code. The consultants said that the IHL division should be entitled to establish its own Book of Rules.

²⁸ *Ibid.*, pp. 8-10.

²⁹ *Ibid.*, p. 12.

Given the potentially high number of war crimes cases, the IHL division would not be able to deal with all cases in Bosnia and Herzegovina, leaving a role for entity-level courts. The IHL division would need the ability to transfer cases to cantonal courts in the Federation, district courts in the Republika Srpska and the Brcko District Court where appropriate. The trial chamber should be able to do this after the filing of the indictment; prior to that it would be the responsibility of the IHL prosecutor. The consultants said that IHL division should also have a supervisory role with regard to such prosecutions within the entities, and that the IHL prosecutor should monitor trials conducted at the entity level. On the motion of the Prosecutor, a trial chamber should be empowered to recall a case from the entity court if the case was not conducted in a manner consistent with international standards.³⁰

2.1 The chambers

The sensitivity of cases, and concerns that they will be decided along ethnic lines, dictate a multi-ethnic composition of the court, the prosecutor's office and the investigation wing, to ensure impartiality. International participation in all parts of the judicial procedure was thought to be inevitable if an acceptable standard of the proceedings was to be reached. A system consisting of a mixture of international and national personnel was preferred to one with purely international personnel. It was thought this would give the system higher public credibility and recognition, and would also be an opening for the creation, in the long run, of a purely national system of handling war crimes cases.

The consultants considered many different options in determining the composition of the trial chamber panels. Four main features were identified as necessary:

- a multi-ethnic panel to minimise complaints of ethnic bias;
- international representation to ensure impartiality and that trials are conducted according to international standards;
- an uneven number of judges to avoid deadlocked panels; and
- an effective working composition of judges.

This led, in the final analysis, to two possible models: a trial panel composed of two national judges from different ethnic groups and one international judge; or a trial panel composed of three national judges from different ethnic groups and two international judges. The first option was strongly supported, but considered problematic because one or more of the constituent groups in Bosnia and Herzegovina would not be represented. The second option was less than ideal because five judges are considered too many to hear a trial in first instance. The consultants, however, proposed nevertheless that a trial chamber within the division should consist of five judges, three of whom would be nationals, each from a different ethnic group, with two international appointments, and that a panel should consist of either all judges in the chamber or three judges, including one international. Initially it was recommended that one trial chamber be established. If the volume of work demanded and funding was available, additional trial chambers could be created³¹.

³⁰ *Ibid.*, pp. 10-12.

³¹ *Ibid.*, p. 12.

The IHL appeals chamber would ultimately hear appeals on decisions of the IHL trial chamber. For an accused whose trial for war crimes took place in a Federation Cantonal Court, a District Court in Republika Srpska or the Brcko District Court, the avenue of appeal would be to the IHL trial chamber. Appeals from either the IHL trial chamber to the IHL appeals chamber or from the entity level courts to the IHL trial chamber would be limited to matters involving errors on a question of law invalidating the decision and errors of fact occasioning a miscarriage of justice.

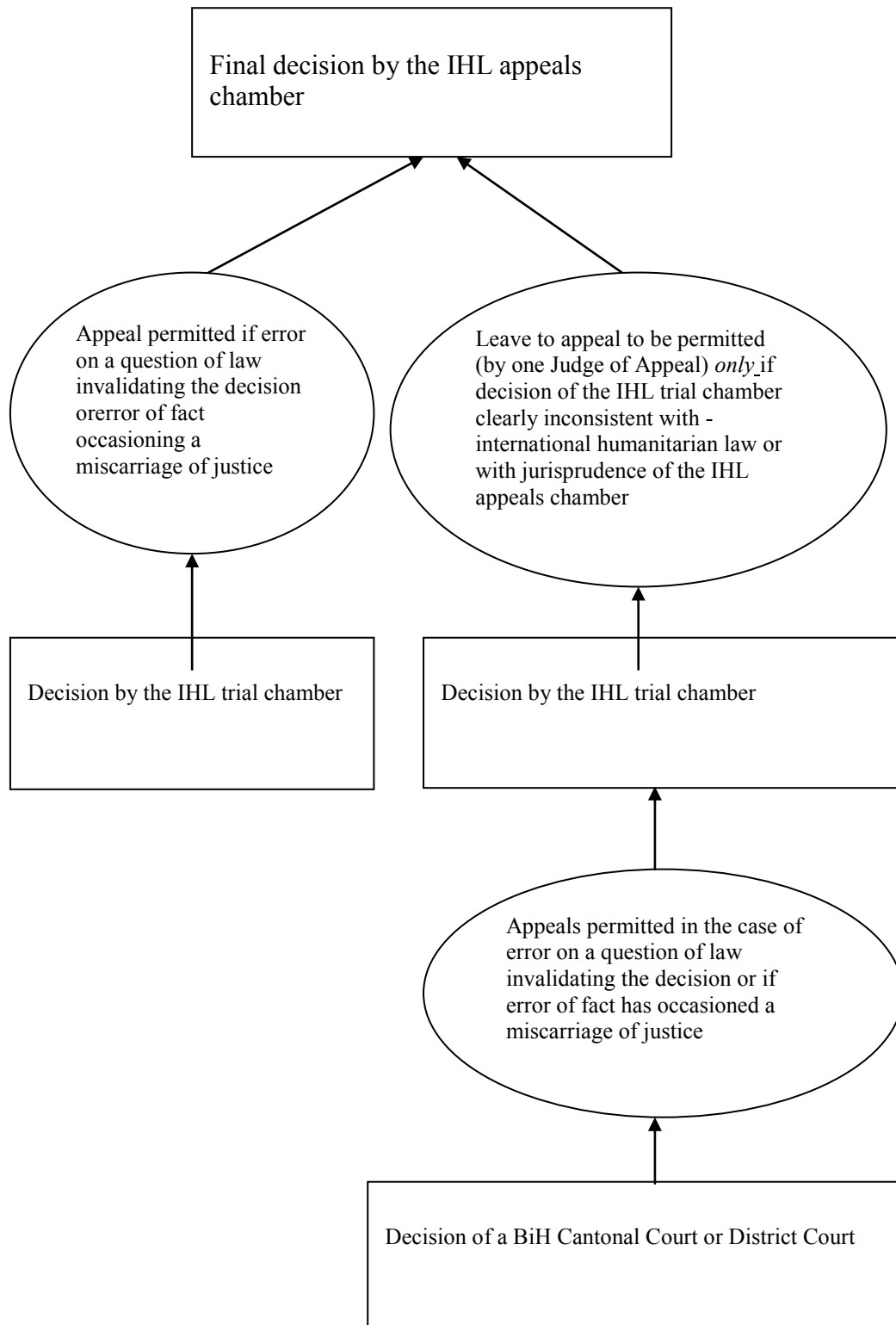
It was not recommended that the appeals chamber hear appeals directly from the cantonal and district courts, as it was assumed that the number of appeals from the local courts could be overwhelming. The consultants also considered that the IHL trial chamber should be of a higher rank within the judiciary in Bosnia and Herzegovina than the cantonal and district courts. However, it was deemed necessary to ensure consistency in the application of international humanitarian law throughout all courts, something that suggested a single appellate court in Bosnia and Herzegovina. To secure this aim, a review mechanism, similar to that of extraordinary remedies, was proposed for appeals to the IHL appeals chamber. A single judge of the appeals chamber would be entitled to grant leave to appeal a decision of the trial chamber in relation to an appeal in a case tried in first instance by a local court, if the decision was clearly inconsistent with international humanitarian law or clearly inconsistent with the jurisprudence of the IHL appeals chamber.

Decisions of the appeals chamber and refusal of leave to appeal by an appeals chamber judge would settle cases definitively. Cases tried after an appeal would only be sent back to the lower instance court to be retried if grave errors of fact had occurred. Where a new fact had been discovered which was not known at the time of the proceedings and could have been a decisive factor in reaching judgement, a submission for review of the judgement could be submitted.

The IHL appeals chamber would consist of a panel of both local and international judges. The panel would be composed of at least two international and three national judges, the latter to include no judges from the same ethnic group. The appeals chamber would have the ability also to decide on whether it would hear a matter.³²

³² *Ibid.*, pp. 13-15.

Structure of Appeals³³



³³

Ibid., Annex 8.

The consultants were advised that the appointment of judges in the Court of Bosnia and Herzegovina would become the responsibility of an independent High Judicial Council. It seemed consistent and appropriate for this mechanism to be used for the appointment of judges and prosecutors to the IHL division of the Court of Bosnia and Herzegovina. The vetting procedure would be demanding and call for deep consultation with a number of actors, domestic as well as international. The consultants considered that the involvement of international judges would only be necessary for such a period of time as necessary to develop standards to a level consistent with those expected by the international and national community. There should be provisions regarding the duration of the international component. A period of five years from the date the IHL division became operational was recommended.

To be eligible for appointment as a judge, national members would have to possess considerable judicial experience. Their main area of expertise should be criminal law. For appointment as an international member of a panel, similar criteria should apply, together with international criminal law experience. Previous experience as a Senior Legal Adviser or Senior Trial Attorney with the ICTY or International Criminal Tribunal for Rwanda (ICTR) could qualify a person for appointment. International judges would be appointed on conditions consistent with those for international judges in other courts in Bosnia and Herzegovina. Judges appointed from within Bosnia and Herzegovina should receive the same emoluments as their national counterparts in the Court of Bosnia and Herzegovina³⁴.

2.2 Types of Cases

The consultants were unable to obtain reliable data as to the number of cases likely to confront the courts in Bosnia and Herzegovina. Whether a case would be dealt with seems ultimately to depend upon what its characteristics are. The consultants identified four types of cases, although the lines between the various categories can be quite blurred.

“Leadership” cases should remain with the ICTY, the consultants believed. They were characterised as follows: complex matters involving high-level accused, *e.g.*, political, military and police officials; case involving high levels of victimisation, occurring in a continuing way over an extended period of time and larger geographical areas; and cases more likely than not dealing with the complex issue of command responsibility.³⁵

Cases of “mid-level offenders, egregious cases or notorious offenders” would involve people who had less significant leadership roles, but who were accused of particularly egregious or notorious acts. This group would include military, para-military, police and political figures at a local level, now generally considered notorious war criminals by one ethnic group and war heroes by another. It would also include cases where it is clear that an entity-level court would not have the ability to deal with a notorious offender. Also included in this group would be cases involving persons accused of crimes both in Bosnia and Herzegovina and in other territories of the former Yugoslavia³⁶.

³⁴ *Ibid.*, pp. 15-16.

³⁵ *Ibid.*, p. 16.

³⁶ *Ibid.*

A third category, which would occasionally require separate considerations, related to crimes of sexual violence³⁷.

The fourth type of cases would involve “lower-level accused”, accused of isolated offences, and cases which were not of a complex nature, generally relying on eye-witness testimony which establishes whether or not the accused committed some individual acts falling within the ambit of serious violations of international humanitarian law³⁸.

Currently identified “Rules of the Road” cases could fall within any of the above categories.

The consultants considered whether it was necessary to limit the scope of war crimes proceedings, applying a strategy similar to the ICTY, concentrating only on the more serious cases, or whether there should also be a time-line according to which domestic war crimes proceedings should be completed. There is no statute of limitation for war crimes in Bosnia and Herzegovina. The consultants were of the view that this was appropriate and that there should not be any time limitation in which cases should be heard, nor should there be any limitation as to the level of cases which could be prosecuted³⁹.

2.3 The prosecutor

The consultants proposed that a separate IHL state prosecutor’s be established within the envisaged state prosecutor’s office, connected to the Court of Bosnia and Herzegovina, and that relevant regulation should be included in a law on the state prosecutor. The IHL prosecutor would be responsible for cases referred to Bosnia and Herzegovina by the ICTY and investigation and prosecution of other cases involving mid-level offenders, egregious cases or notorious offenders, and cases involving allegations of sexual violence. Lower-level offenders could be dealt with either in the IHL division or, when so decided by the IHL prosecutor, in lower-level courts.

The IHL prosecutor would decide which cases would be pursued in the Court of Bosnia and Herzegovina and which cases would be pursued at the entity level. The IHL prosecutor would have a supervisory role in relation to entity prosecutors when they are involved in war crimes investigations or prosecutions. According to the consultants, the first IHL prosecutor should be an international. He or she should be assisted by deputy prosecutors as required. Wherever possible there should be deputy prosecutors from different ethnic groups. The prosecutor should also have an international deputy appointed to be responsible for appeals. In due course, for instance after five years, national appointments should replace both.

The IHL prosecutor should be independent of all domestic and international bodies, and stand free from, and at the same level as, the regular Court of Bosnia and Herzegovina Prosecutor. The composition of the IHL prosecutor’s office should reflect the ethnic make-up of Bosnia and Herzegovina. A state-wide parallel to the already existing system in the Federation that empowers the Prosecutor to decide which Cantonal Prosecutor should handle a case, if this question arises, should be created. Thus, the IHL prosecutor would have the discretion to decide which court should deal with a case. In making these decisions the

³⁷ *Ibid.*, p. 17.

³⁸ *Ibid.*

³⁹ *Ibid.*, p. 17.

prosecutor would have due regard to legal requirements and the type of case as set out earlier in this paper. According to the consultants, the prosecutor's decision as to venue should be final and binding. Legislation would have to be amended for this to occur. The procedures for appointment should be the same as for judges.

The consultants were of the opinion that until their recommendations were fully implemented and operational, war crimes cases being conducted locally should continue. Cases should continue to be submitted to the ICTY Prosecutor, for assessment under the "Rules of the Road" programme according to the Rome Agreement of 1996. Once the IHL division of the Court of Bosnia and Herzegovina, and the IHL prosecutor's office would have become fully operational, the "Rules of the Road" process could be transferred to the IHL prosecutor. This would be consistent with the IHL prosecutor's function of overall supervision of war crimes prosecutions in Bosnia and Herzegovina. It was recognised that initially the volume of this task might be too great for the IHL prosecutor to take over. The position would therefore be reviewed once the IHL prosecutor's office had become operational and a date set for the changeover.⁴⁰

2.4 Defence counsel

It is an integral part of fair and proper trials that the accused be represented by competent counsel to defend his or her legal interests in court. While an accused always has the option of hiring counsel, the question how to ensure that indigent accused are properly represented before the court arises. The consultants suggested that the domestic tradition of court-appointed counsel should be continued. It was noted locally that defence counsel, appointed *ex officio* by the court, do not seem to defend accused with the same vigour as counsel hired directly. There may be several reasons for this but in order to ensure proper defence in the cases in question the consultants recommended that funds should be available to pay court appointed counsel through a defence trust fund; and that a public defenders support unit should be established.

In order to ensure a consistent and qualified defence, it was considered necessary to develop a set of rules regulating, as a minimum, financial requirements for determination of indigent status, authority to appoint counsel; minimum professional requirements; the ability of an accused to object to and reject court appointed counsel; and misconduct of counsel, including failure to show up in court and failure to adhere to generally accepted professional defence standards. A decision to refuse a request to appoint defence counsel should be subject to appeal. Misconduct of counsel should, after warning, lead to refusal of audience. It was envisaged that the public defenders support unit should consist of five persons of whom two should be internationals while the remaining three should be nationals, attorneys and support staff. The consultants did not suggest that the public defenders support unit represent clients in court but merely provide support and advice to court-appointed defence attorneys regarding international humanitarian law issues, including ICTY practice. Essentially this would be an expanded version of the service currently provided by the ICTY Outreach Programme.⁴¹

⁴⁰ *Ibid.*, pp.18-19.

⁴¹ *Ibid.*, pp. 19-20.

2.5 The registrar

The consultants recommended the establishment of a registry and appointment of a registrar, assisted by suitable personnel, to carry out the following functions: organisation of the smooth running of the chambers; registration of documents related to court proceedings; information systems management; archiving; assistance and technical support to the chambers and the prosecutor's office; administrative control of the witness protection unit; administrative control of the court police; maintenance of a law library, in collaboration with ICTY; and language services.

The consultants were advised that the court registries in Bosnia and Herzegovina had very limited competencies. Due to the very nature of war crimes cases the consultants deemed it necessary to establish an independent registry for the purpose of dealing with numerous practical and legal aspects pertaining to handling of evidence, witnesses, etc. They felt that these duties should not be the responsibility of the courts or the prosecutor's office. It was proposed that the first Registrar be an international appointment.⁴²

2.6 War crimes cases within the domestic court system

It was recommended that trials for war crimes of lower level accused be limited to nominated Cantonal or District Courts, and only as referred by the Court of Bosnia and Herzegovina IHL prosecutor. Banja Luka, Mostar, Sarajevo, and Brcko are recommended for such nomination.

At the Bosnia and Herzegovina level there is a Human Rights Chamber, a Constitutional Court and the above-mentioned Court of Bosnia and Herzegovina, which is not yet operational. There is international representation in both the Human Rights Chamber and the Constitutional Court.

For the Federation, there are fifty-two Municipal Courts, five Cantonal Courts, a Supreme Court, and a Constitutional Court. War crimes prosecutions could take place in first instance in Municipal Courts in some Cantons, but mostly in the Cantonal Courts. This situation was deemed too complex;; there were too many courts to allow war crimes cases and witness protection to be dealt with in a secure and consistent manner across the entire court system. It was recommended that trials for war crimes of lower level accused be limited to nominated Cantonal Courts, *e.g.*, Mostar and Sarajevo, and only as referred by the Court of Bosnia and Herzegovina IHL prosecutor.

In the Republika Srpska there are twenty-five Basic Courts, five District Courts, a Supreme Court, and a Constitutional Court. As with the Federation, this was considered too complex to allow war crimes cases and witness protection to be dealt with in a secure and consistent manner across the entire court system. It was recommended that trials for war crimes of lower level accused be limited to one District Court, preferably Banja Luka, as referred by the Court of Bosnia and Herzegovina IHL prosecutor.

The new judicial model in the Brcko District has a court system, which comprises a first instance Basic Court and a second instance Appellate Court. The Court of Bosnia and Herzegovina will be a third instance court. It was recommended that the Brcko second

⁴² *Ibid.*, pp. 20-21.

instance court deal with war crimes cases if referred by the IHL prosecutor. Appeals would lie to the Court of Bosnia and Herzegovina IHL division.⁴³

2.7 Bosnian law, and its relationship to the ICTY

The consultants considered it preferable that, to the extent possible, the provisions set up in domestic legislation should serve as a basis for new or amended legislation. When not sufficient, amendments to existing legislation or creation of new regulations were recommended. Provisions should also take into account developments in the law as applied in the ICTY. The Criminal Code of Bosnia and Herzegovina, Criminal Codes and Criminal Procedure Codes of the Federation, Republika Srpska and the Brcko District should be amended to include consistent provisions regarding war crimes.

The jurisprudence of the ICTY should be persuasive authority in procedural, as well as criminal matters, in the interpretation of legislation by Bosnia and Herzegovina courts on all levels. However, the consultants realised that the differences between the legal systems would make an obligation for local courts to follow the jurisprudence of the Tribunal completely impossible. A regulation stating that the courts should take into account the jurisprudence of the Tribunal was recommended. The consultants also recommended that the temporal jurisdiction should commence on 1 January 1991 as with the ICTY. The territorial jurisdiction should be limited to conduct within the borders now recognised as being those of Bosnia and Herzegovina.

Provisions should be enacted to allow abbreviated proceedings where the accused admits guilt and it is in the interest of justice to limit the amount of evidence taken. Where the accused has contributed substantially to expediting the proceedings, either by admitting guilt in his or her own case, or by providing reliable and cogent testimony in proceedings against others, he or she should be entitled to a substantial discount in sentence.

Once established, the first task of the judges of the IHL division of the Court of Bosnia and Herzegovina would be to prepare a Book of Rules for the Chambers under the relevant domestic legislation. A substantial list of changes to domestic legislation, including both amendments and a number of new statutes, would also be required.⁴⁴

Various rules have been implemented by the ICTY to facilitate receiving testimony in an efficient and effective way and to avoid the need to call multiple witnesses in some cases, or the same witnesses over and over again in cases against different accused. To the extent possible, these measures should be adopted, according to the consultants.

The rights of the accused in Bosnia and Herzegovina are already guaranteed under the Constitution and are an integral part of domestic law. The Bosnia and Herzegovina Criminal Procedure Code should, in the view of the consultants, be consistent with all the rights given suspects under the ICTY Rules 42 and 43. Rule 43, for example, requires the electronic recording of suspect interviews. Although this would necessitate the purchase of expensive recording equipment, it was felt to be warranted. Interviews conducted in this manner should be admissible as evidence. The accused should have the right to defence counsel, both at interview and at trial.

⁴³ *Ibid.*, pp. 21-22.

⁴⁴ *Ibid.*, Annex 14 (on file with the author) provides a list of the relevant legislation requiring amendment and the new legislation that will be required.

Cases involving conduct both in Bosnia and Herzegovina and other republics of the former Yugoslavia should remain with the ICTY. The jurisdiction of the IHL division of the Court of Bosnia and Herzegovina, the entity courts and Brcko District court should be concurrent. As set out above, the IHL prosecutor would decide at the outset whether a matter was to be tried in the IHL division or at the entity or Brcko level. The IHL prosecutor would have the right to intervene in local proceedings under certain circumstances, in the same way that the ICTY can intervene in national war crimes cases.

In the view of the consultants, provisions should be enacted to allow shortened proceedings where the accused admits guilt and it is in the interest of justice to limit the amount of evidence taken. Where the accused has contributed substantially in expediting proceedings, either by admitting guilt in his or her own case, or by providing reliable and cogent testimony in proceedings against others, he or she should be entitled to a substantial reduction in sentence. A procedure for guilty pleas does not exist in the Federation or in Republika Srpska. The Federation Criminal Procedure Code contains a regulation (article 218) to the effect that the authority conducting the procedure has a duty to gather other evidence even though the accused has confessed. A similar regulation is in place in the Republika Srpska Criminal Procedure Code (Article 223). This regulation is an example of “the principle of the material truth”, which seemed to have deep roots in Bosnia and Herzegovina.

However, the consultants opined that if the confession was clear and complete, and was corroborated by other evidence, further investigation should only be undertaken on the recommendation of the prosecutor. In the Brcko Criminal Procedure Code (article 156), there are provisions on the acceptance of guilty pleas similar to those in the ICTY Rules of Procedure and Evidence. These should be considered. In the IHL division of the Court of Bosnia and Herzegovina and in entity level courts, confessions of guilt should be regarded as an additional piece of evidence, which together with a sufficient factual basis, establishing that the crime occurred and that the participation of the accused may in itself lead to a conviction. The principle of the material truth at present puts on the court an obligation to take part very actively in the collection of evidence in a way that might at least be seen as having an influence on its impartiality. With the creation of a relatively strong prosecutorial organisation in the Bosnia and Herzegovina criminal procedure system, the validity of the principle is being reassessed.⁴⁵

This is yet another example of legal colonialism, supplemented by ignorance of the civil law approach, by representatives of the common law systems, as it is clearly intended to steer the judiciary towards embracing an adversarial model of some kind. A French judge who worked in Kosovo has criticised the phenomenon, as he saw it in action there, challenging the massive influence of American lawyers “[i]gnorant superbement la tradition juridique continentale et voulant imposer leurs propres standards”.⁴⁶

2.8 Protective measures for witnesses

The consultants recommended the adoption of a wide range of protective measures for witnesses involved in war crimes cases, to be based on a threat assessment. Psychosocial

⁴⁵ *Ibid.*, pp. 22-25.

⁴⁶ PATRICE DE CHARETTE, *LES OISEAUX NOIRS DU KOSOVO, UN JUGE A PRISTINA* 50-51 (2002).

support for witnesses was recommended. The implementation of these measures would require the establishment of a professional witness protection and support unit. Robust criminal sanctions should also be in place to deal with any attempts to interfere with witnesses.

Pre-trial protective measures would include: ensuring during the investigation process that it is not widely known that a witness has participated in an investigation; non-disclosure of the name and address of the witness until shortly before proceedings; orders not to interfere with witnesses; orders for defendants and their legal counsel not to disclose the identity of witnesses; notification of local police officials that a witness is under threat, (provided there is a clear commitment to respond urgently to any overt threats received by the witness); use of electronic devices within the witness's home or work place, to alert police in cases of emergency; close personal protection in extreme cases; various forms of relocation (temporary or permanent) until the nature of the threat subsides; other measures as appropriate.

Once a trial commences, protective measures, similar to those utilised in the ICTY, could be adopted. The aim of these measures would be to create a regime where members of the public and officials alike would become aware that any improper interference with the judicial process would not be tolerated.⁴⁷

It appears probable that witnesses in war crimes cases will be called from either entity. Often, witnesses from one ethnic group would be called for the prosecution and from another group for the defence. There have been numerous reports of extreme difficulties in summoning witnesses across entity boundaries, and for the Brcko District from either entity. Measures are needed to address this. The present agreements or regulations on inter-entity co-operation and co-operation with the Brcko District were not considered sufficient for the purpose of handling war crimes cases. Without a legal obligation for full co-operation, there would be no substantial basis for advancing war crimes cases in Bosnia and Herzegovina. There should not only be an obligation on judicial co-operation and co-operation for other official agencies with the judiciary, but also strong legal remedies for those not fulfilling the obligations. According to the consultants, new agreements involving the state as well as the entities and the Brcko District should be negotiated which would guarantee fully effective co-operation⁴⁸.

2.9 Issues regarding transfer of cases

The consultants were of the opinion that a formula must be established for remitting cases from the ICTY to the IHL division of the Court of Bosnia and Herzegovina. This could include a joint consideration by the ICTY Prosecutor and the IHL prosecutor, taking into account factors such as: complexity of the case; witness availability and the number of witnesses who reside outside Bosnia and Herzegovina; whether substantial issues in the case have already been resolved in the ICTY; command responsibility issues involved in the case; local factors which may affect decisions on venue; possible delays in commencing the trial and whether the accused would receive an earlier trial at ICTY; remaining investigative

⁴⁷ "Consultants' Report to the OHR, The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina", *supra* note 25, pp. 25-28.

⁴⁸ *Ibid.*, pp. 28-29.

activity before trial can commence; measures necessary to ensure that remitted cases would be carried out in a manner acceptable to ICTY; whether the case raises issues of territorial jurisdiction, for example, if the accused is alleged to have committed crimes in other republics of the former Yugoslavia.

The accused should also be entitled to make submissions on whether his or her case should be remitted to Bosnia and Herzegovina. The final decision would rest with a Judge of a Trial Chamber of the ICTY. The question was raised as to whether a facilitating agreement between the ICTY and Bosnia and Herzegovina would be necessary for cases to be transferred to the IHL division. As the ICTY and Bosnia and Herzegovina have concurrent jurisdiction with regard to prosecution of war crimes cases, and further, having regard to proposed amendments to the Rule 11*bis* of the ICTY's Rules of Evidence and Procedure, it was felt that a facilitating agreement would not be necessary to allow a transfer to take place.

The ICTY proposed that after arrest of an accused it had indicted, the case could be suspended and transferred to a court in Bosnia and Herzegovina for trial. Reaching the indictment stage signalled the starting point for trials in both the ICTY and in Bosnia and Herzegovina. The standard for reaching an indictment at the ICTY appeared to be similar to that which will be required in the Court of Bosnia and Herzegovina. This led the consultants to the conclusion that if the ICTY were to transfer a case after indictment, it would be at a similar stage to a case after indictment in Bosnia and Herzegovina. A significant issue to be resolved related to the material to be provided by the ICTY to the Court of Bosnia and Herzegovina when a case was referred to it. It was anticipated that along with the accused and the indictment, the ICTY would forward the Prosecutor's pre-trial brief,⁴⁹ witness lists and statements, exhibit lists and exhibits, including documentary evidence, video evidence, photographs and other physical evidence, depositions of witnesses who have given evidence in other trials involving the same facts or before presiding officer, and judicial decisions regarding those facts.

There was considerable concern whether the material gathered by the ICTY would be admissible before a court in Bosnia and Herzegovina. National judges and prosecutors were said not to be used to receiving cases in this format and would require considerable guidance on how to use the materials, and legislative action might be required in order to facilitate this. At a minimum, judicial guidelines would need to be prepared to assist the judiciary in determining these questions. Confidentiality issues relating to material obtained by the ICTY would have to be addressed, particularly where evidence emanated from material provided under Rule 70 of the ICTY's Rules of Procedure and Evidence, which concerns evidence not subject to disclosure.⁵⁰

⁴⁹ This would appear to be at odds with the procedural sequence at the ICTY, because the pre-trial brief is filed by the Prosecutor only close to the trial date. If the time of decision is the indictment stage, there will usually be no pre-trial brief, and the prosecution before the Bosnian court may well form completely different views on the facts and the law than the ICTY prosecutors.

⁵⁰ "Consultants' Report to the OHR, The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina", *supra* note 25, pp. 30-32.

2.10 Investigations, arrests, sentences and their enforcement

It was recommended that an investigations unit be established within the Prosecutor's Office to carry out war crimes investigations. The investigations unit should be free of the constraints currently hindering inter-entity co-operation. In short, it would have to be capable of conducting investigations and other related tasks across the whole of Bosnia and Herzegovina, irrespective of where the activity is to take place. The proposed court will not function without a mechanism to enforce its decisions. Therefore, the consultants recommended the establishment of a court police, similar to the system operating in the Federation, for execution of orders of the court for attendance of witnesses, arrest of accused and persons to be sentenced, and maintenance of order and security in the courtroom and in the court premises.⁵¹ The consultants also recommended that sentences be served in Bosnia and Herzegovina. Such sentences should be in accordance with the applicable law of the entity where the sentence is served, subject to the supervision of the trial or appeals chamber of the IHL division.⁵²

2.11 The Truth and Reconciliation Commission

The relationship between the IHL division and the proposed Truth and Reconciliation Commission (TRC) was said to be difficult to define. The purpose of the TRC is to provide a forum for victims to tell their story and to establish, without apportioning guilt, the horrific events, which occurred in the conflict in Bosnia and Herzegovina. If the experience of previous similar commissions could be a guide, disclosures at the TRC would precipitate calls for judicial action concerning certain events. Further, matters that would come to light in the TRC might well be forwarded to the IHL prosecutor for investigation, or alternatively, the IHL prosecutor might deem it his or her responsibility to track TRC proceedings and initiate investigations where warranted. From either perspective this could increase the work of the IHL prosecutor and ultimately increase the work of the IHL division.⁵³

2.12 Budget and funding

When examining the various options for the establishment of the IHL division, the consultants found that there were essentially two hypotheses. A "best case scenario," where the proposed budget and model was adopted in full, and was fully funded, and a "modest but will suffice" version, based on either the deletion of certain elements or their acquisition at below cost. Detailed budgets and funding requirements were outlined for each of these scenarios.⁵⁴ The cost of the first option was calculated at €4,818,000 to establish and then €6,532,650 to run the IHL division for the first year. If three trial panels were established instead of one, the cost would increase to approximately €11,632,450 per year. The cost estimates are adjustable. The single most expensive cost is establishment of the infrastructure of courtrooms, office space and computer networks. Starting from scratch, offices, court

⁵¹ *Ibid.*, pp. 32-34.

⁵² *Ibid.*, pp. 34-35.

⁵³ *Ibid.*, p. 37.

⁵⁴ *Ibid.*, Annex 4 (on file with the author).

modification costs, information technology and office equipment would total approximately €6 million.

The other large item was salaries for international staff. In order to attract competent and dedicated professionals, preferably for a medium to long-term period, salaries would have to be internationally competitive. On the other hand, seconded staff could reduce the need for external funding. However, in order to ensure continuity and strong leadership the consultants strongly recommended keeping seconded staff to a minimum and ensuring that funding was in place for at least all top-level international employees before the process is initiated. With regard to national staff, the budget was based on salary scales for nationals employed by international organisations. This was obviously higher than what public officials in Bosnia and Herzegovina were paid. However without significant financial incentives it is open to question whether the IHL division would be able to attract proper and qualified professionals.⁵⁵

2.13 Implementation

The consultants prepared a proposed time line for implementation of these recommendations that projected the start of the first trial within 180 days.⁵⁶ As preliminaries, the OHR would have to establish a management board with the participation of representatives of stakeholders, securing of adequate funding, and appointment of a project manager. Crucial components that would also have to be in place before this process could begin would include enactment of legal provisions to establish and operate the IHL division, including adoption of new legislation as amendments of relevant laws (Law on the Court of Bosnia and Herzegovina, Criminal Codes, Criminal Procedure Codes, Laws on Prosecutors and other legislation). Suitable premises would have to be acquired.

III. THE ICTY REPORT OF JUNE 2002

The ICTY Report of June 2002,⁵⁷ in which – despite the obvious involvement of ICTY staff in its preparation and the developments prior to the ICTY report – the President declared that the OHR report of May 2002 had not been taken into account,⁵⁸ dealt with a number of problems related to the functioning of the ICTY, and especially with the deferral of cases to courts in Bosnia. The ICTY acknowledged the gradual restoration of democratic institutions in Bosnia and the increase in the number of arrests of high-ranking accused, and, while in the beginning the referral of cases to the courts in the former Yugoslavia was inconceivable, partly because some of them were still at war, that with the return to peace and the reforms of the judicial systems, implementation of a referral process was said to be an “increasingly likely prospect”.⁵⁹ The Tribunal emphasised the need to ensure that the

⁵⁵ *Ibid.*, pp.40-41.

⁵⁶ *Ibid.*, Annex 13 (on file with the author).

⁵⁷ “Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts”, available on the ICTY website as an appendix to the press release of 20 June 2000, SB/P.I.S./512-e.

⁵⁸ *Ibid.*, para. 59.

⁵⁹ *Ibid.*, para. 2.

national courts had the necessary resources for taking on such cases and that they operate fairly and with respect for the principles of international humanitarian law and the protection of human rights.⁶⁰

The report was split into two main parts, a statistical evaluation of the activity of the Office of the Prosecutor and the Chambers, in order to determine the scope of the referral process, and a presentation of the main obstacles to the referral of cases to the national courts of Bosnia and Herzegovina and the necessary reforms in order to overcome them.⁶¹ The first part is not discussed here, because it only set out the reasons why the ICTY had to consider referral and how many cases could be referred.

The ICTY estimated that several persons detained by the Tribunal and possibly fifty potential future defendants could be referred to national courts. They were mainly persons who had held intermediate-level positions between the principal military and political leaders indicted and tried by the Tribunal and the low-ranking subordinates indicted and tried by the national courts. Pursuant to the terms of the Rome Agreement of 18 February 1996, by June 2000, the Prosecutor had received 1,266 files concerning 4,045 suspects from the local authorities, and had examined approximately 700 files concerning about 2,500 suspects.⁶² “Intermediary-level accused” according to the Report, in a somewhat circular definition, meant those in a position of authority sufficiently high-ranking to warrant being indicted by the Prosecutor of the Tribunal - and accordingly, the indictment would be issued by the ICTY Prosecutor and confirmed by a Judge of the Tribunal – and who could be tried by national courts provided that the national courts comply fully with internationally recognised standards of human rights and due process.⁶³

The ICTY recalled⁶⁴ the words of the Secretary-General’s report of 3 May 1993 that: “it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to [serious violations of international humanitarian law]. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures”.⁶⁵ It also referred to the Preamble of the Rome Statute of the International Criminal Court “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” and “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”.

The implementation of the referral process was considered to require amendments to the Statute and a reformulation of Rule 11*bis* of the Rules, and possibly the signing of a co-operation agreement between the Tribunal and the national authorities.⁶⁶ At the extraordinary plenary session of 23 April 2002, the Judges had noted that the Statute contained some ambiguities as to the extent of the Tribunal’s power to refer cases to national courts. They

⁶⁰ *Ibid.*, para. 4.

⁶¹ *Ibid.*, para. 9.

⁶² *Ibid.*, para. 31.

⁶³ *Ibid.*, para. 32.

⁶⁴ *Ibid.*, para. 33.

⁶⁵ “Report of the Secretary-General established pursuant to paragraph 2 of Security Council resolution 808 (1993)”, 3 May 1993, UN Doc. S/25704, para. 64.

⁶⁶ “Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts”, *supra* note 57, para. 35.

suggested that the Security Council resolve the issue by passing a resolution amending the Statute. They were not certain whether the provisions of article 29 of the Statute - which impose on all the member States a general obligation to co-operate with the Tribunal - could be interpreted as allowing the Tribunal to compel national courts to try the persons who would be referred, whilst respecting the indictments issued by the Prosecutor. Nor was it clear that article 9 of the Statute - which establish the principles of concurrent jurisdiction and the primacy of the Tribunal - could be interpreted as authorising the Tribunal to implement a more far-reaching referral process than the one set out in the Rules at the time. The current version of Rule 11*bis* of the Rules made provision only for the suspension of an indictment, under certain conditions, if the case was pending before the national courts.

To implement a truly effective referral process, the judges thought that the scope of the application of this Rule had to be broadened,⁶⁷ with several aims, including allowing certain cases to be referred to the courts of the State on whose territory the crimes were committed,⁶⁸ authorising the referral of cases involving accused not in the custody of the Tribunal⁶⁹ and making it possible for the Tribunal to ensure that the accused be tried by national courts for all the crimes specified in the indictments.⁷⁰ The Rule should also enable the Tribunal to compel the national judicial authorities to respect the protective measures ordered for victims and witnesses.⁷¹ The Rules is were at that time silent as to the level of responsibility required for an accused to be prosecuted in a national court. It was acknowledged that this level was not easy to determine in the abstract, particularly in the context of a conflict which involved both leaders of States or autonomous entities and civilian and paramilitary groups. However, for reasons of transparency *vis-à-vis* the international community and, more particularly, the States of the former Yugoslavia, in addition to the ability of the national courts to conform to international standards, the Tribunal wanted to take into consideration the position of the accused and the gravity of the crimes with which they were charged. It was to be for the Tribunal to assess and set out *in concreto* the main points of those criteria.⁷² The Judges also wanted the Rule to authorise the competent Trial Chamber to decide *ex officio* to refer a case after having given the Prosecutor and, where applicable, the accused the opportunity to be heard.

The Prosecutor objected to the fact that a Trial Chamber could decide *ex officio* to refer a case, as this would infringe upon the powers conferred on her by the Statute. However, Rule 11*bis* of the Rules current at the time already gave a Trial Chamber the right to act *ex officio*.⁷³ The Prosecutor believed at the time that Bosnia was the only country that could be considered for the referral process.⁷⁴

The report briefly described the steps the authorities of Bosnia had taken with respect to reforming their judicial system, namely incorporating violations of the law of war into the criminal codes, bringing the codes of criminal procedure into line with international conventions on the protection of human rights, reinforcing the procedural guarantees during

⁶⁷ *Ibid.*, para. 37.

⁶⁸ *Ibid.*, para. 38.

⁶⁹ *Ibid.*, para. 39.

⁷⁰ *Ibid.*, para. 40.

⁷¹ *Ibid.*, para. 41.

⁷² *Ibid.*, para. 42.

⁷³ *Ibid.*, para. 43.

⁷⁴ *Ibid.*, para. 45.

the preliminary investigation, judicial examination and trial, harmonising the rules of evidence with the requirements of a fair trial, adopting measures to guarantee the status and independence of the judiciary, and adopting a code of professional conduct for the judiciary.⁷⁵

The report described the main obstacles to referral proceedings: risk of dependency and partiality of the judiciary; lack or ineffectiveness of witness protection provisions; lack of training of the judiciary and law professionals; insufficient financial and logistical resources; slowness of the judicial system; incomplete compatibility of national substantive law with international law.⁷⁶ According to the report, these obstacles could be overcome in several ways. The local judges, prosecutors and court personnel could receive additional training in international criminal law and human rights. International judges could be sent to serve in national courts. International observers to oversee the conduct of the trials and, where need be, advise the judiciary could also be sent. More fundamentally, several aspects of the judicial system could be restructured.⁷⁷

The respective advantages and disadvantages of the various solutions were summarised as follows in the following table⁷⁸:

Overview of the different solutions

Possible solutions	Main advantages	Main disadvantages	Comparison of the main advantages and disadvantages
Use of the current national system together with training of the local judiciary in international criminal law	<p>The solution</p> <ol style="list-style-type: none"> 1. makes it possible to use the law and criminal procedure in force; 2. avoids the difficulties linked to implementing a reform of the judicial system; 3. ensures substantial support for the court personnel; 4. can be set in place in a short time. 	<p>The solution</p> <ol style="list-style-type: none"> 1. does not encourage the efforts to reform the judicial institution; 2. limits the action taken to a single type of player in the judicial system. 	<ol style="list-style-type: none"> 1. Training the local judiciary is a worthwhile step since it offers a further guarantee of professionalism and, therefore, contributes towards bolstering the public's feeling of confidence in its judicial system. 2. Nonetheless, the proposed training of the judiciary will not in itself suffice to respond to the inherent requirements of the very specific context of Bosnia and Herzegovina. For example, it does not make it possible to resolve the difficulties linked to the compartmentalisation of the judicial systems, which will nonetheless have to be overcome if war crimes are to be punished effectively in Bosnia and Herzegovina.
Use of the current system together with the sending	The solution	The solution	<ol style="list-style-type: none"> 1. The sending of international observers could, in the long term,

⁷⁵ *Ibid.*, para. 48.

⁷⁶ *Ibid.*, paras. 50-57.

⁷⁷ *Ibid.*, para. 58.

⁷⁸ *Ibid.*, para. 60.

<p>of international observers</p>	<p>1. makes it possible to use the criminal law and procedure in force without infringing upon State sovereignty; 2. avoids the difficulties linked to implementing a reform of the judicial system; 3. promotes the effective application of international norms; 4. can be set in place in a short time.</p>	<p>1. does not encourage the efforts to reform the judicial institutions; 2. might make the role of the observers uncomfortable (they could be restricted to a purely passive role); 3. must be applied in conjunction with measures guaranteeing the protection of the victims and witnesses.</p>	<p>make it possible to restore the confidence of the citizens in their own judicial system. 2. Nonetheless, the model remains insufficient because it does not allow the judicial institutions to be reformed directly, or the difficulties linked to the compartmentalisation of the two entities' judicial systems to be resolved.</p>
<p>Use of the current national system together with the addition of international judges to the local courts</p>	<p>The solution</p> <p>1. makes it possible to use the criminal law and procedure in force; 2. makes it possible to guarantee that the international norms are better applied; 3. makes it possible to contribute to re-establishing the public's confidence in the local judicial system; 4. potentially enables the international judges to contribute to reforming the judicial system; 5. ensures effective collaboration between the Tribunal and the national courts; 6. can be set in place in a short time.</p>	<p>The solution requires significant legislative and judicial changes.</p>	<p>1. The sending of international judges would make it possible to resolve quickly and visibly a number of crucial difficulties pointed to by the international observers (especially the citizens' lack of confidence and the problems linked to the ethnic make-up of the courts). 2. Although it does not allow for a substantial reform of the judicial system, the solution does however have many considerable advantages in the specific context of Bosnia and Herzegovina (see column 1).</p>

<p>Use of the State Court</p>	<p>The solution</p> <ol style="list-style-type: none"> 1. makes it possible to use a local judicial institution currently being established; 2. contributes towards encouraging the effort to build the State by the State itself; 3. makes it possible to set in place a uniform practice for punishing perpetrators of war crimes, that is to say, one used State-wide; 4. can be set in place in a short time. 	<p>The solution</p> <ol style="list-style-type: none"> 1. requires national legislation to be reworked in order to establish a specialised chamber at the court concerned; 2. creates a difference between the jurisdictions and powers of the Court and the Tribunal, which are distinct; 3. might bring about a lack of consistency between the procedure applied at the Tribunal and that at the State Court; 4. does not best guarantee the availability and qualifications of the personnel assigned. 	<ol style="list-style-type: none"> 1. Using a court currently being set up seems appropriate, as Bosnia and Herzegovina already has many courts. 2. The creation of the court is consistent with the provisions of the national constitution. 3. The creation of a State-level court will make it possible to resolve the problem linked to the separation of the entities, which currently causes major difficulties for punishing the accused. 4. Such a court could be operational quite quickly, as both observers and players involved in the national system agree that the reform of the national system must commence as soon as possible.
<p>Establishment of a special international court</p>	<p>The solution</p> <ol style="list-style-type: none"> 1. makes it possible to have a judicial structure perfectly adapted to the transfer of cases (it would be given exhaustively defined powers similar to the Tribunal's); 2. guarantees that international norms are applied effectively (especially as regards witness protection); 3. ensures that the Special Court's rules are compatible with the Tribunal's; 4. guarantees that prosecutions are carried out professionally (by making judges and qualified court personnel available). 	<p>The solution</p> <ol style="list-style-type: none"> 1. requires that an additional court be set up. This involves: (a) the adoption of a Security Council resolution; and (b) an amendment of the national constitution which would give rise to long and complicated procedures; 2. would make it necessary to use a criminal procedure greatly different and far removed from the local judicial traditions; 3. would require considerable time to set up an institution of this kind; 4. would compel the international community to assume a considerable financial burden. 5. would be tantamount to not encouraging some of the necessary local reforms; 6. would prevent national judges from trying war criminals as they would defer to international judges. 	<ol style="list-style-type: none"> 1. Using a single court fully adapted to trying international crimes seems very attractive. 2. Nonetheless, the establishment of an international court in Bosnia and Herzegovina does not seem appropriate since it in no way contributes towards the reform of the judicial system sought.

Which model was the most appropriate depended primarily on the specific nature of the cases likely to be referred. Even if by definition a special international court was perfectly adapted to trying war crimes and crimes against humanity, the option of setting one up presented three major disadvantages. First, it could not be operational immediately since it would require the Security Council to pass a resolution, which could not be taken for granted. The court would also be extremely expensive, as this would amount to setting up a “mini-International Tribunal” in Bosnia and Herzegovina. Lastly, the solution would add a further court to Bosnia and Herzegovina’s already greatly complex judicial scene.⁷⁹

The State Court appeared to the ICTY to be more conducive to reconciling the specific requirement of punishing war crimes and crimes against humanity with the particularities of Bosnia and Herzegovina’s judicial system. Among the many advantages of using this Court, was the fact that it conformed fully with the provisions of the constitution, according to which the State had exclusive jurisdiction in matters of international criminal law and that, in September 2001, the Constitutional Court found that the creation of the State Court was consistent with the Constitution. Furthermore, with the State Court it would be possible to guarantee that all areas of law were uniform on a national level as well as to resolve the excessive compartmentalisation of the judicial system between the two entities, which had been particularly apparent in the prosecution and trial of war crimes.⁸⁰ Using the State Court was thought to avoid having to set up an additional court whilst also supporting the effort to build the State by the State itself. This was seen as an essential advantage because all the observers and players involved in the judicial system of Bosnia and Herzegovina agreed that any reform of the judicial system’s structures could produce results only if it was consonant with the legal traditions of the State and carried out in close co-operation with the existing judicial authorities.⁸¹ The district and cantonal courts could assist the work of the State Court, which alone would not be able to try the very large number of war crimes cases. In addition to all the cases involving intermediate-level accused which should be referred by the Tribunal pursuant to Rule 11 *bis* of the Rules, there were all those involving subordinates which the national courts were hearing in accordance with the Rome Agreement which numbered around several hundred.⁸²

The process advocated by the ICTY was considered as precluding a complete upheaval of the judiciary in Bosnia and Herzegovina. Although new structures would have to be established, it was important to work with the existing judicial institutions and organs as they constituted irreplaceable reference points for the citizens of Bosnia and Herzegovina. The State Court should handle only those cases involving intermediary-level accused which had been referred by the Tribunal, as well as the cases over which the district and cantonal courts would ordinarily have jurisdiction but whose sensitive nature required that they be tried on the national level, an assessment which should be made by the prosecutor of the Court. In addition, the State Court could hear appeals against cantonal and district court decisions. Lastly, international observers should monitor the conduct of proceedings before the district and cantonal courts responsible for trying subordinates in accordance with the

⁷⁹ *Ibid.*, paras. 60-61.

⁸⁰ *Ibid.*, paras. 63-64.

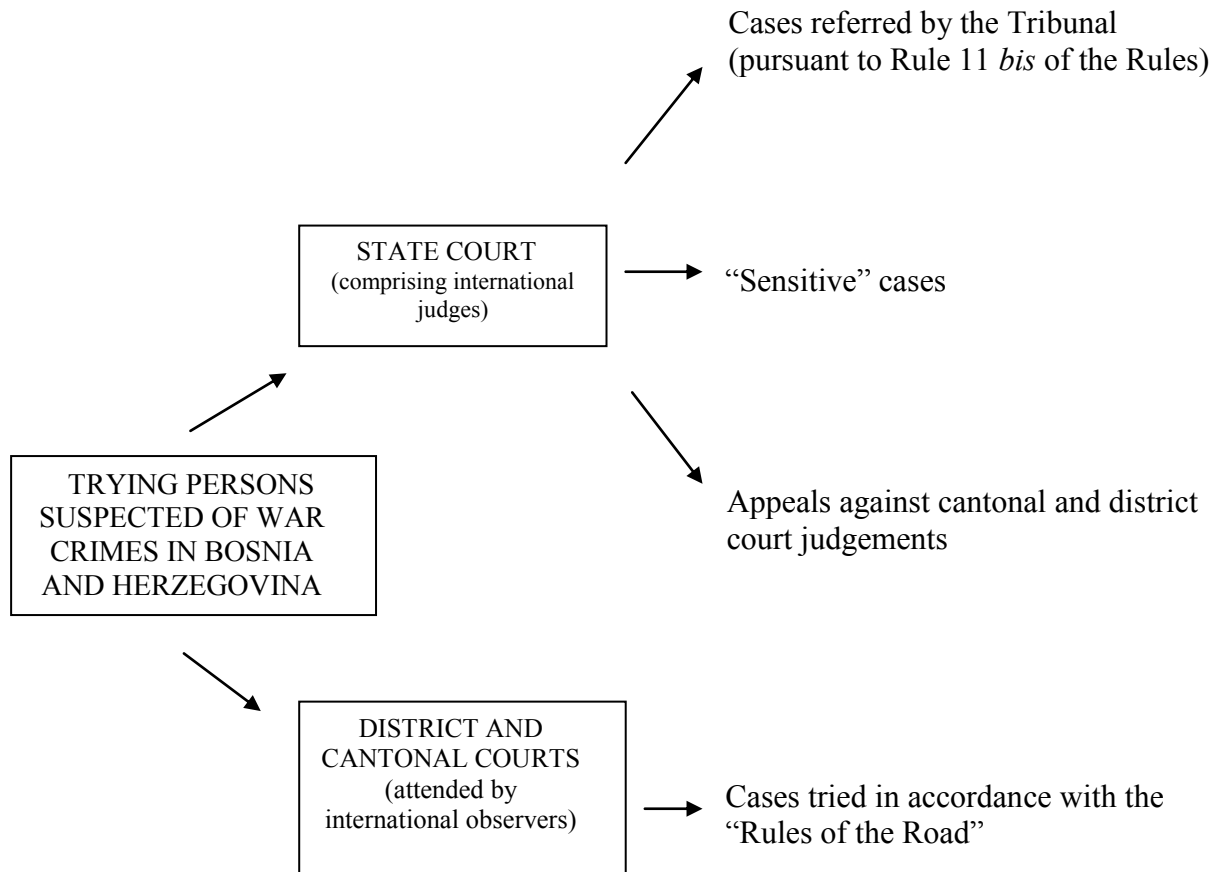
⁸¹ *Ibid.*, para. 65.

⁸² *Ibid.*, para. 66.

Rome Agreement in order to ensure that they conformed with the most fundamental guarantees of the criminal trial⁸³. This was visualised in the following flowchart⁸⁴:

⁸³ *Ibid.*, para. 67-68.
⁸⁴ *Ibid.*, para. 69.

Flowchart of jurisdictions



The ICTY also dealt with the pre-requisites for implementing the recommended solutions. The participation of the national courts in trying war criminals presupposed that they were in a position to make impartial and independent rulings, in accordance with the principles laid down in the Statute. As such, the authorities concerned should adopt general provisions inherent to the proper functioning of any judicial system, as well as more specific provisions in order to make it possible to punish war crimes and crimes against humanity. This meant that Bosnia and Herzegovina would have to adopt general provisions in order to ensure fully the impartiality and independence of the judiciary and, in particular, prevent the political authorities from being able to interfere in investigations. Moreover, it would have to make certain that arrest and pre-trial detention are covered by guarantees, ensure that trials are fair, make sure that the accused and detainees are treated equally without regard to their nationality, political views or religious beliefs, respect the minimum criteria for the detention conditions of detainees and convicted persons, and abolish the death penalty and preclude any possible means of reintroducing it.

It was also considered necessary to adapt the existing national laws to the over-riding needs of punishing war crimes and crimes against humanity by sending international judges to serve in the courts responsible for trying cases referred by the Tribunal, making the national judiciary more familiar with the rules of international criminal law, through training,

adapting certain aspects of internal criminal procedure to the requirements of international criminal procedure, especially for the protection of victims and witnesses, and ensuring that all the serious violations of international humanitarian law established under articles 2 to 5 of the Tribunal's Statute and the principles governing individual criminal responsibility embodied in article 7 are provided for in internal criminal law.⁸⁵

The Report concluded with the recommendations to the UN Security Council. In order to wind down its mission – that is to complete its investigations around 2004 and its first instance trials around 2008 – the Tribunal had to further concentrate its activity on the prosecution and trial of the highest-ranking political and military leaders and refer intermediary-level accused, even if they are not yet in the custody of the Tribunal, to the national courts, principally, those of Bosnia and Herzegovina.⁸⁶ So as to implement this two-pronged process of “concentration” and “referral”, the Tribunal intended to take certain measures in order to ensure that the accused answer in the national courts for all the crimes specified in the indictments brought by the Prosecutor and confirmed by the judges of the Tribunal, the national courts respect the protective measures ordered by the Tribunal for the victims and witnesses, and the national trials are conducted in accordance with the international norms for the protection of human rights.⁸⁷

With this in mind, the Tribunal recommended that a Chamber with the jurisdiction to try the accused referred by the Tribunal be established within the State Court of Bosnia and Herzegovina. It suggested that international judges serve alongside the national judges in the State Court for at least a certain period. It proposed that the local prosecutors, judges and court personnel receive training in international humanitarian law. It considered the possibility of having international observers ensure that the proceedings instigated in the district and cantonal courts pursuant to the Rome Agreement (“Rules of the Road”) would be conducted properly.⁸⁸

The Report closed with a programme of action which called for the holding of a diplomatic seminar in The Hague to present the report to the diplomats serving in The Netherlands. This was to be followed by adoption of amendments to the Rules in order to expedite proceedings further, submission of the report to the members of the Security Council and, by the first quarter of 2003, implementation of the process for referring cases to national courts.⁸⁹

IV. SUBSEQUENT DEVELOPMENTS

As indicated in the action plan of the June 2002 ICTY Report, Claude Jorda and Carla del Ponte visited Bosnia from 17 to 21 June 2002 to discuss the implementation of its recommendations.⁹⁰ This was followed by the third diplomatic seminar at the ICTY on 27 June 2002, when Jorda, del Ponte and the Registrar, Hans Holthuis, briefed the diplomatic community in the Hague on the aims of the completion strategy and the June 2002 Report.

⁸⁵ *Ibid.*, paras. 70-73.

⁸⁶ *Ibid.*, para. 83.

⁸⁷ *Ibid.*, para. 84.

⁸⁸ *Ibid.*, para. 85.

⁸⁹ *Ibid.*, para. 87.

⁹⁰ Press release of 14 June 2002, JdH/P.I.S./681-e.

On 26 July 2002, after another plenary on 11 and 12 July 2002, Claude Jorda spoke again before the Security Council about the exit strategy.⁹¹ The Prosecutor, he said, had reviewed the investigations underway to determine the number of persons who should be tried by the ICTY and those who should be tried on the national level. She estimated that of the approximately one hundred individuals to be indicted by 2004, fifty might be tried by the courts of Bosnia and Herzegovina. A number of persons already indicted by the ICTY who might already be referred to the national courts of that country would have to be added to this figure. She considered that these were principally intermediate-level accused hierarchically falling between the main leaders indicted and tried by the Tribunal and the minor actors indicted and tried by the national courts. President Jorda asked the Council to exert all its influence with the Member States, particularly in the former Yugoslavia, to arrest the accused in their territory, especially the high-ranking political and military leaders, and transfer them to the ICTY.

Prior to implementing a referral process, he stated that the ICTY needed to be sure that the Statute mandated it to take all the measures necessary to this end. At the extraordinary plenary session of 23 April 2002, the Judges had observed that the Statute contained some ambiguities regarding the extent of the ICTY's powers to refer cases to national courts. As the texts then stood, it was not certain that the ICTY was authorised to implement a referral process whose scope extends beyond that then provided for by Rule 11*bis* of the Rules of Procedure and Evidence. He also pointed out the difficulties still remaining. Despite the gradual re-establishment of democratic institutions and the return to peace in the country, the local courts were still faced with significant structural difficulties. These were said to arise mainly from the excessive compartmentalisation of the judicial systems of the Federation and the Republika Srpska, the lack of co-operation between the two entities, the political influence brought to bear on judges and prosecutors, the often "mono-ethnic" composition of the local courts, the difficulty of protecting victims and witnesses effectively and the court personnel's lack of training and the backlog of cases at the courts.

President Jorda admitted that the OHR had embarked upon far-reaching reforms of the judicial system. Although it would not be possible to complete this process for some years, the ICTY could begin referring certain cases as early as 2003, and thus a transitional solution would have to be found. It would consist of establishing within the State Court of Bosnia and Herzegovina a chamber with special jurisdiction to try serious violations of international humanitarian law. He stressed that this plan was supported by the members of the Presidency of Bosnia and Herzegovina. The applicable procedure should be the one in force in Bosnia and Herzegovina and not an international procedure, which would be complex, and constitute an amalgam of the civil and common law traditions. Additionally, the local judges and prosecutors, most staff members, defence counsel and the accused would find it especially easy to use the "local" procedure as they were already familiar with it. The trials of individuals accused of war crimes would be more in keeping with the legal traditions of Bosnia and Herzegovina and completed more rapidly.

According to President Jorda, the jurisdiction of the State Court should be circumscribed in order to prevent it from being rapidly overwhelmed by the vast number of war crimes cases yet to be tried in Bosnia and Herzegovina. He recommended that the State

⁹¹ Press release of 26 July 2002, JDH/P.I.S./690-e, containing the full text of the speech.

Court should handle only the cases referred by the ICTY and certain others which would normally fall within the province of the local courts but whose sensitive nature required that they be tried at the state level. The State Court could also be made responsible for ensuring that proceedings in local courts respected the most fundamental guarantees of a criminal trial. The local courts should continue to be involved in prosecuting and trying low-ranking war criminals. In order to enhance the effectiveness of the Agreement and guarantee the impartiality of the local courts, it might be appropriate to authorise international observers to oversee the proper conduct of the proceedings before such courts or, as the High Representative had proposed, to restructure them into a small number of “multi-ethnic” regional courts.

A three-tier judicial architecture was, in sum, proposed by Jorda. The first tier, the ICTY, would handle the major political, military, paramilitary and civilian leaders. This first tier was temporary as it had to disappear once the ICTY’s mission had been accomplished. The second tier, the State Court, would handle intermediate-level accused who would be referred by the International Tribunal. The Court was conceived as a national institution accorded a limited and provisional international character in order to guarantee its impartiality. The third tier, the local courts, would handle low-ranking accused tried in accordance with the Rome Agreement. Within this structure, the ICTY would be responsible for overseeing the proper conduct of the second-tier trials and the State Court the third-tier trials.

Following President Jorda’s address to the Security Council, a statement was issued on behalf of the President of the Security Council stating:

The Council recognises, as it has done on other occasions (for example in its resolution 1329 (2000) of 30 November 2000), that the ICTY should concentrate its work on the prosecution and trial of the civilian, military and paramilitary leaders suspected of being responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, rather than on minor actors.

The Security Council therefore endorses the report’s broad strategy for the transfer of cases involving intermediary and lower-level accused to competent national jurisdictions as likely to be in practice the best way of allowing the ICTY to achieve its current objective of completing all trial activities at first instance by 2008.⁹²

The next extraordinary plenary session of the ICTY judges took place on 30 September 2002, during which Rule 11*bis* was amended.⁹³ It now reads:

Rule 11 *bis*

⁹² *Ibid.*

⁹³ Press release of 1 October 2002, JdH/P.I.S./696-e.

Referral of the Indictment to Another Court

(A) If an indictment has been confirmed, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a Trial Chamber for the purpose of referring a case to the authorities of a State:

- (i) in whose territory the crime was committed; or
 - (ii) in which the accused was arrested,
- so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Trial Chamber may order such referral proprio motu or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard.

(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall, in accordance with Security Council Presidential Statement S/PRST/2002/21, consider the gravity of the crimes charged and the level of responsibility of the accused.

(D) Where an order is issued pursuant to this Rule:

- (i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;
- (ii) the Chamber may order that protective measures for certain witnesses or victims remain in force;
- (iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;
- (iv) the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf.

(E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred to trial.

(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Trial Chamber may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

Things then happened fast. Claude Jorda addressed the General Assembly again on 28 October 2002,⁹⁴ and he and Carla del Ponte both spoke before the Security Council on 29 October 2002.⁹⁵ In their speeches they both gave an update of the progress reached, which did, however, not present anything new. The judges at the ICTY were also given an update

⁹⁴ Press release of 29 October 2002, JDH/P.I.S./707-e, containing the full text of the speech.

⁹⁵ Press releases of 30 October 2002, JDH/P.I.S./708-e (Jorda) and JJJ/P.I.S./709-e (del Ponte), both containing the full text of the speeches.

on the progress during the next plenary on 12 December 2002.⁹⁶ A working group of ICTY and OHR experts met on 15 January 2003 to discuss preliminary technical issues, which was to be presented to the Peace Implementation Council Steering Board at the end of January 2003.⁹⁷ On 14 February 2003, the ICTY hosted the fourth diplomatic seminar in the Hague, where the diplomatic community was informed of the status of the efforts.⁹⁸ Finally, on 21 February 2003, Claude Jorda (who had just been elected a judge of the International Criminal Court, precipitating his resignation from the ICTY) and the Senior Deputy High Representative Bernard Fassier, signed joint conclusions on the development of the war crimes trial capacities in Bosnia:

JOINT CONCLUSIONS

The OHR-ICTY working group considered the institutional and legal framework, the technical and logistical requirements, the type and number of cases and the possible financial burden of developing BiH [Bosnia and Herzegovina]'s capabilities in this regard. The working group's Conclusions show:

- A specialised, three-panel chamber within the newly established Court of Bosnia and Herzegovina, is, in the first phase, the most appropriate institution in BiH to try war crimes cases. This Chamber will be an institution of Bosnia and Herzegovina operating under the laws of the state. Nevertheless, for an initial period there should be a temporary international component in its judiciary and court management.
- The Prosecutor's Office of BiH must include a War Crimes Department with a temporary international component. In addition, due to problems remaining in BiH, there must be effective support for the investigation of war crimes and the apprehension of suspects.
- The specialised War Crimes Chamber within the Court of BiH will have jurisdiction over three types of war crimes: those cases deferred by ICTY in accordance with Rule 11 bis of the Rules of Procedure and Evidence (approximately 15 accused); those cases deferred by the ICTY Prosecutor's office, for which Indictments have not yet been issued (approximately 45 suspects); and those "Rules of the Road" cases before

⁹⁶ Press release of 13 December 2002, JdH/P.I.S./718-e.

⁹⁷ Press release of 15 January 2003, OHR/P.I.S./723-3.

⁹⁸ Press release of 14 February 2003, CC/P.I.S./727-e.

domestic courts, which due to their sensitivity should be tried at the State Court level.

- BiH Laws shall apply. The ICTY experience will also be referred to in the development of specific rules of procedure for the specialised War Crimes Chamber of the Court of BiH, and in the review of the Criminal Procedure Code of BiH.
- The establishment of the specialised War Crimes Chamber of the Court of BiH requires the renovation of additional facilities as well as adequate security measures.
- The creation of state level detention facilities is a precondition not only for the work of the future specialised War Crimes Chamber of the Court of BiH, but for the work of its other chambers as well.
- A witness protection programme and a programme to provide security for judges and prosecutors must be developed.

Both the OHR and the ICTY recognise that an effective war crimes trial capability within BiH is an essential part of the establishment of the rule of law and fundamental to the reconciliation process, creating necessary conditions to secure a lasting peace in BiH.⁹⁹

These conclusions were presented to the Peace Implementation Council in Brussels on 28 March 2003 and are to be put before the Security Council as soon as practicable, although at this time, there are more serious problems taking up the Council's time.¹⁰⁰ Bernard Fassier briefed the Steering Board on the OHR-ICTY plan to enable the effective domestic prosecution of war crimes cases in Bosnia and Herzegovina, and their evaluation of the costs. The Steering Board supported the objectives of this plan, agreeing that it was essential that it should be adequately resourced, and clearly define responsibilities for establishing, implementing, and then transferring to Bosnia and Herzegovina, the administration of the chamber before it is launched.

* * * * *

“Such a terrible complexity has been left by the Austro-Hungarian Empire, which some desire to restore; such a complexity, in which nobody can be right and nobody can be wrong, and the future cannot be fortunate.”¹⁰¹ Thus Rebecca West, when talking about Croatia in her report on the Yugoslavia of the 1930s, described the immense problems of

⁹⁹ Press release of 21 February 2003, OHR/P.I.S./731-e.

¹⁰⁰ See press statement of 30 March 2003 at <www.ohr.int/pic/default.asp?content_id=29583> (last accessed on 8 April 2003).

¹⁰¹ REBECCA WEST, BLACK LAMB AND GREY FALCON, A JOURNEY THROUGH YUGOSLAVIA 112 (2001).

bringing harmony to the differing interests of and movements within the ethnic factions. The same problems appear to persist today in Bosnia. The international community, and especially the United Nations, intends to take another step towards achieving that elusive harmony by allowing the citizens of that country to come to terms with their past in their own way. Whether the citizens, and more precisely, the judges, prosecutors, counsel and policemen, and above all the local politicians of Bosnia are ready for this endeavour is open to question. In part the world community does so because of political and financial constraints on the operation of the ICTY, whose initial mission and subsequent procedural framework were never meant to allow the trial of dozens of minor to mid-level war criminals, and in part it will have to do its utmost in order to restore credibility to the international diplomatic forum and to exorcise the ghosts of Austria-Hungary which Rebecca West wrote about – there is a lot to be done. Those ghosts are now more a thing of the past to us than they were in Rebecca West's times, but the world is never short of new ones, and it would appear that the most recent ones have come to life in Iraq. It is time that the leaders of the powerful nations spared the simple people of this planet the creation of terrible complexities – otherwise Rebecca West's prophecy that the future cannot be fortunate will not only be true for the Balkans, but for all of us.

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